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BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION

STATE OF MONTANA

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| IN THE MATTER OF THE PETITION |) | OSPI 250-95 |
| TO TRANSFER TERRITORY FROM HIGH |) | |
| SCHOOL DISTRICT NO 6 (LAME DER), |) | DECISION AND |
| ROSEBUD COUNTY, MONTANA TO HIGH |) | ORDER |
| SCHOOL DISTRICT NO. 19 (COLSTRIP), |) | |
| ROSEBUD COUNTY, MONTANA |) | |
| * * * * * |) | * * * * * |

On June 17, 1994, the Rosebud County Superintendent of Schools received a petition from certain electors who reside in Lame Deer High School District No. 6 (hereinafter "the Petitioners") requesting the transfer of territory from Lame Deer High School District (Lame Deer) to Colstrip High School District (Colstrip). On June 22, 1934, the Board of County Commissioners, Rosebud County, notified the County Superintendent that the petition met the criteria of § 20-6-320, MCA (1993).

Lame Deer filed a Motion asking the Court to Stay the Petition for Transfer of Territory until the Court rendered its decision in Cause No. DV 93-142. On December 8, 1994, the District Court denied the Motion for Stay and held that the Petition to Transfer the Territory could be filed with the County Superintendent.

The hearing on the Petition began on July 25, 1994, and was continued to November 1, 1994. The County Superintendent granted the Petition transferring the territory from Lame Deer High School District No. 6 to Colstrip High School District No. 19 on

February 3, 1995. Lame Deer appealed the County Superintendent's decision to the State Superintendent in accordance with § 20-6-320(7), MCA. The parties submitted briefs and waived oral argument.

After review of the County Superintendent's record of the hearing and her Findings of Fact, Conclusions of Law and Order granting the transfer of territory from Lame Deer to Colstrip, this State Superintendent concludes that:

O R D E R

The County Superintendent had jurisdiction to hear and decide this Petition for Transfer of Territory and the Superintendent of Public Instruction has jurisdiction to hear this Appeal. After reviewing the complete record, the State Superintendent is of the definite and firm conviction that the County Superintendent misapprehended the effect of the evidence and made a mistake in granting the petition to transfer territory from Lame Deer to Colstrip. The County Superintendent's decision is hereby reversed and the petition for transfer of territory from Lame Deer High School District is denied.

STANDARD OF REVIEW

This Superintendent's review of a county superintendent's order is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in ARM 10.6.125.

The Montana Supreme Court adopted the following three-part test to determine whether a finding of fact is clearly erroneous.

First, the Court will review the record to see if the findings are supported by substantial evidence on the whole record. Second, if the findings are supported by substantial evidence, the Court will determine if the trial court has misapprehended the effect of evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still find that "A finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed." State Compensation Mutual Insurance Fund. v. Lee Rost Logging, 252 Mont. 97, 927 P.2d 85, 49 St. Rep. 102 (1992).

Conclusions of law are reviewed to determine if the agency's interpretation of the law is correct. Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990).

DISCUSSION

Territories from Colstrip High School District No. 19, Rosebud County, Montana, and Hardin High School District No. 17-H, Big Horn County, Montana, were used to create Lame Deer High School District on November 9, 1993. The boundaries of the new high school district are shown on Lame Deer's Exhibit No. 3, attached. Both Hardin and Colstrip School Districts opposed the creation of the Lame Deer District and appealed the State Superintendent's Order. That Appeal is pending before the District Court in the Sixteenth Judicial District, Rosebud County, Montana, in Civil Cause No. DV 93-142, In the Matter of the Northern Cheyenne Petition to Create a New High School District. Lame Deer contends that the County

Superintendent and the State Superintendent lack jurisdiction to hear this Petition and Appeal because jurisdiction rests with the Sixteenth Judicial District.

The State Superintendent concludes that the Sixteenth Judicial District's ruling on jurisdiction controls, and rejects Lane Deer's contention that the County Superintendent and the State Superintendent lack jurisdiction to hear the Petition for Transfer and Appeal. In the Matter of the Northern Cheyenne Petition to Create a New High School District, Cause No. DV 93-142, Sixteenth Judicial District, Memorandum & Opinion (December 8, 1994).

Constitutional Questions:

Lane Deer contends that granting this transfer of territory from Lane Deer to Colstrip and transferring territory from Lane Deer to Hardin [In Re Petition to Transfer Territory From High School District No. 6, Lane Deer, Rosebud County, Montana to High School District No. 1, Hardin, Big Horn County, Montana, OSPI 251-95] violates the Montana and U.S. Constitutions since the territory remaining in the Lane Deer District would be located entirely on the Northern Cheyenne Reservation. No Montana court has decided whether such a result is constitutional. Therefore, the State Superintendent leaves the constitutional issues to the courts.

The remaining issues are:

1. Whether the County Superintendent's conclusion that the "the benefit to the residents of the territory to be transferred outweighs any adverse effects to the remaining residents of the Lane Deer High School District" (County Superintendent Order, 2/3/95, Conclusion of Law No. 11, page 13) misconstrues the evidence and is a mistake.
2. Whether the County Superintendent's failure to consider that granting the transfer of territory would require students living in the territory to travel through the nearest high

school district, Lame Deer, to reach a more distant resident high school is reversible error.

Section 20-6-320(6), MCA, requires that the County Superintendent's decision "be based on the effects that the transfer would have on those residing in the territory proposed for transfer as well as those residing in the remaining territory of the high school district." The County Superintendent set forth the following as the effects of granting the transfer:

{1} Transfer of the territory is in the best interests of the residents and taxpayers who reside in the territory sought to be transferred for the following reasons:

- (a) Students who reside in the territory sought to be transferred desire to attend Colstrip High School District for educational choice.
- (b) Parents in the remaining Lame Deer High School District and in the territory sought to be transferred may continue to have their children attend school at either Lame Deer High School or Colstrip High School.
- (c) Parents who reside in the territory to be transferred will have voting rights in the school district where their children wish to attend.
- (d) **All** taxpayers in the territory sought to be transferred would recognize a significant tax savings based on the present Lame Deer High School budget and there is no guarantee that future budgets will not increase the tax burden even higher.
- (e) Both Lame Deer High School and Colstrip High School offer a multicultural education in a multicultural environment.
- (f) If, for some reason, by discretionary act of the Lame Deer High School Board, the Lame Deer School Districts' borders were closed to other districts, the students in the transfer territory could still attend Colstrip High School without transportation difficulties and controversies.
- (g) Non-Indians will not be isolated and segregated from Indians as both races attend Colstrip High School.

- (h) Colstrip High School has provided requested information to the parents and students in the territory sought to be transferred. Lame Deer High School has refused to provide requested information to the parents and students.

[2] The effects the transfer of territory would have on Lame Deer High School District [the remaining territory] are:

- (a) Parents in the territory sought to be transferred and remaining in Lame Deer High School District may continue to have their children attend school at either Lame Deer High School or Colstrip High School.
- (b) The tax base would go down, but revenues would be neutralized by increased state student entitlement funds and guaranteed tax base revenue.
- (c) Additional revenue sources would still be available to Lame Deer High School.
- (d) The transfer of territory would not affect the ability of Lame Deer High School to have a good, high quality educational program. It also would not affect their opportunity to build, enhance and improve on their curriculum and educational opportunities.
- (e) Transfer of territory would not affect the ANB count, which drives the General Fund Budget, as the students in the territory sought to be transfer(ed) were not included in the initial ANB.
- (f) The mere fact of transfer of territory does not alter the option of school of choice, and therefore, does not promote discrimination and prejudice. It will not make the Indian students any more isolated from daily contact with Non-Indian students than they are at present.
- (g) The Lame Deer High School can continue to structure and build on educational programs to help solve problems of high drop-out rates, teenage pregnancy and low self-esteem of their students.

County Superintendent Order, Conclusion of Law No. 10, pages 11 - 13.

The County Superintendent concluded that: "(T)he benefit to the residents of the territory to be transferred outweighs any adverse effects to the remaining residents of the Lame Deer High

School District." Conclusion of Law No. 11, page 13. She concluded that the effect of granting the transfer would have a "neutral" effect on the territory remaining in Lame Deer and a reduction in local school taxes for residents in the territory transferred to Colstrip. Her conclusion flies in the face of FOF 27 (page 9) which states in part: "There is no guarantee that there won't be further tax increases due to rising transportation costs, bonds, changes in funding at the federal and/or state levels, fluctuating ANB count, etc." The County Superintendent recognized that a mill levy to raise local revenue outside the general fund of Lame Deer would result in increased taxes for Lame Deer property taxpayers. The County Superintendent's conclusion that the effect is neutral requires two assumptions: (1) that the board of trustees for Lame Deer will not exercise its legal right to use mill levies to raise money for any of the reasons cited in FOF 27; and (2) that the board of trustees for Lame Deer will not use a mill levy to fund the general budget above the BASE level. See §§ 20-6-306, 307 and 308, MCA.

The Montana Supreme Court in Helena Elementary School District No. 1 v. State of Montana, 236 Mont. 44, 769 P.2d 684 (1989), found a relationship between school district funding levels and equality of educational opportunity. It recognized that Montana's reliance on local property taxes to fund education resulted in revenue "rich" and "poor" districts depending on the taxable value of the property in the district. This petition for transfer of territory, if granted, moves taxable value from a "poor" district to a "rich" district. The County Superintendent appears to ignore the Court's

holding and states: "[t]he transfer of territory would not affect the ability of Lane Deer High School to have a good, high quality educational program. It also would not affect their opportunity to build, enhance and improve on their curriculum and education opportunities." and "[t]he Lane Deer High School can continue to structure and build on educational programs to help solve problems of high drop-out rates, teenage pregnancy and **low** self-esteem of their students." (Conclusions of Law No. 10(d) and (g), page 13)

The guaranteed tax base aid (**GTSA**) formula requires that state general fund revenues be used to reduce the difference in revenues raised by a mill in local school districts with vastly different taxable values. The **GTSA** guarantees that a mill will raise at least as much money for a district's general fund as the average local district mill in the state. Access to **GTBA** revenue is limited to the district general fund at the **BASE** level. If a district chooses to use a mill levy to increase its general fund budget beyond the **BASE** level, state **GTBA** funds cannot **be** used to supplement the mill revenues. Local school district options for using mill levies should not be preempted by granting a transfer of territory that will significantly increase taxable value disparity between the receiving and losing districts, unless there are other compelling reasons for the transfer. Transfers based solely on **a** reduction of individual property taxes are not in the best interest of Montana kids who are residents of the losing district.

The taxable value in Lane Deer High School District at the time of the hearing was slightly more than \$2 million. Transfer of territory from Lane Deer to Colstrip would reduce that taxable

value by approximately \$1.3 million. Such a reduction would shift local district funding of the district general fund budget from the local taxpayers to the state. For example, assume that the transfer of territory reduces the revenue raised by a mill from \$1,800 to \$190 and that the statewide average mill raises \$10,200. The GTEA state general fund revenues will be used to bring the value of a mill up to the statewide average -- \$10,150. In the above example, reduction in revenue raised by a mill requires distribution of additional GTEA funds to the district. The County Superintendent is correct that the transfer does not increase the tax burden of the local property owner for funding the district general fund to the BASE level. However, the transfer substantially increases the portion of the local district budget funded by the state taxpayer. Granting transfers for the reason that individual taxpayers will pay less in local school taxes encourages taxpayers in districts with low property tax values to petition for a transfer to a district with a higher taxable value. If granted, the individual taxpayer would likely pay less local district property taxes in the "richer" district.

IRREGULAR DISTRICT BOUNDARIES:

A cursory look at Lame Deer's Exhibits #3 and #4 (attached) shows that granting Petitioners' request for transfer to Colstrip would result in the Lame Deer District being bordered by Colstrip District on three sides -- the North, the East and partially on the South. All of the paved roads from the transferred territory to Colstrip High School pass through Lame Deer, Montana, the location of Lame Deer High School. See Lame Deer Exhibit #3. Students from

the area sought to be transferred would be required to drive through Lame Deer to reach their resident Colstrip High School. This Superintendent does not believe that requiring students to travel through one high school district to reach a more distant resident high school is sound educational policy. The County Superintendent makes one finding on this effect in Montana (Conclusion of Law 10(f), page 12):

If, for some reason, by discretionary act of the Lame Deer High School Board, ~~the~~ Lame Deer School Districts' borders were closed to other districts, the students in the transfer territory could still attend Colstrip High School without transportation difficulties and controversies.

The County Superintendent misconstrued the effect that transferring the territory would have on potential transportation difficulties and controversies between the districts. If the transfer is granted, Colstrip will run buses from the transferred territory through Lame Deer to reach Colstrip High School. One of the major areas of controversy between local school districts involves buses running through another district and allowing that district's students to ride the buses to the other district. Granting the transfer of territory from Lame Deer to Colstrip will not eliminate potential transportation difficulties and controversies. It has a high probability of creating more controversy.

OTHER FACTORS:

The County Superintendent concludes that both Lame Deer and Colstrip Districts have open enrollment policies and permit students from either District to enroll and offer a multicultural environment. Most of the listed "effects" of granting the petition

describe the existing situation and will not change if the petition is granted. However, if the transfer is granted, parents residing in the territory to be transferred will have voting rights in the school district their children attend. The parents have made individual choices about where their children attend school. Such choices result in the children attending outside of their district of residence and consequently, the parents do not have voting rights in the nonresident district. Montana law permits parents to vote in their resident school district. Many Montana children attend school outside their district of residence, it is not advisable to establish district boundaries on where the current residents attend school. District boundaries are intended to provide the stability required for adequate planning of facilities and educational programs, and changes in boundaries should not be made on the basis of individual preferences or tax burdens.

The Lame Deer School Superintendent admitted at the hearing that he refused to provide certain requested information to residents of the territory seeking to transfer to Colstrip. The State Superintendent does not approve of his action. The law provides specific legal remedies for a school district's denial of access to public records and failure to provide the opportunity for meaningful public participation in the decision making process. However, the Superintendent's action is not a valid reason for changing a district boundary.

The State Superintendent takes this opportunity to call attention to the fact that Montana school law uses a different standard for deciding when a new high school district can be

created or a petition for a transfer of land can be granted if the action involves districts having 50,000 acres or more of nontaxable Indian land. This State Superintendent believes that granting petitions to create a new high school or to transfer territory from one district to another that results in a tax base for any of the effected districts of less than \$2 million is educationally unsound. The legislature addresses minimum taxable value in §§ 20-6-320 and 20-6-325(8), MCA. A petition for transfer of territory can be approved if there is at least \$300,000 taxable value or 50,000 acres of nontaxable Indian lands. Section 20-6-325(8) [creating a new high school district] requires that the taxable value of the property of each new district must be at least \$1 million, unless 50,000 acres or more of such proposed new district are nontaxable Indian land, and the taxable value of the taxable property **of** each existing district from which territory would be detached must be at least \$2 million after the territory is detached. It is difficult, if not impossible, to justify the inconsistency in these requirements. In the creation of the Lane Deer High School District, such inconsistencies were not an issue because both Colstrip and Hardin had a remaining taxable value of more than \$2 million and the newly created high school district had a taxable value of slightly more than \$2 million. Affirming the transfer of territory from Lane Deer to Colstrip will reduce the taxable value of Lane Deer to less than \$1 million. Acknowledging that there are high school districts in Montana with less than \$1 million taxable value, it **is** this State Superintendent's opinion that using discretionary power to reduce the taxable value of a

high school district to less than \$2 million is unsound given Montana's continued reliance on local property taxes to provide local funding for school districts.

DATED this 19th day of December, 1996.

Nancy Keenan
NANCY KEENAN

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this 20th day of December, 1996,
a true and exact copy of the foregoing DECISION AND ORDER was
mailed, postage prepaid, to the following:

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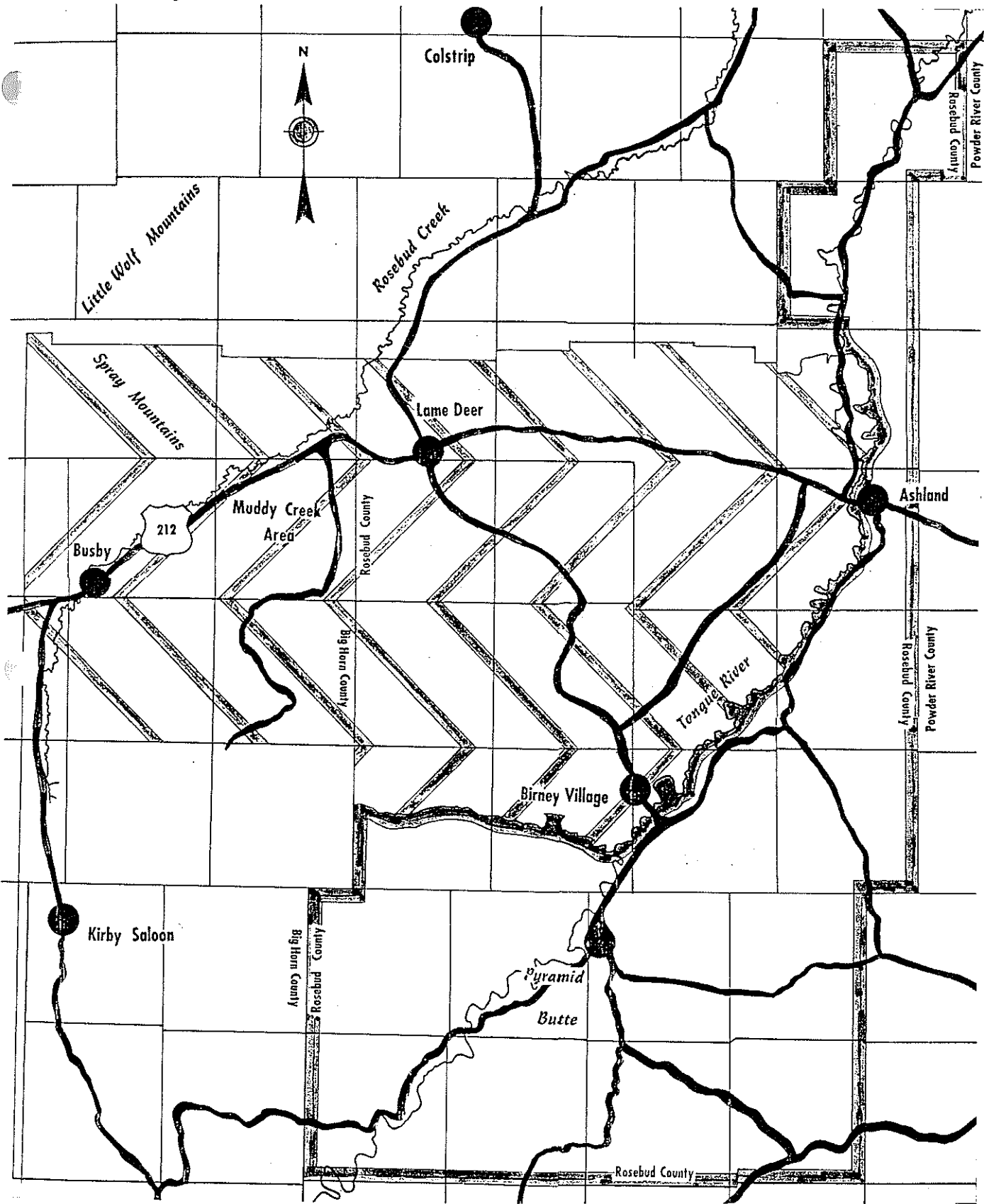
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Linda Brandon-Kjos
Administrative Officer
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Basic Map



RESPONDENT'S
EXHIBIT
3

Paved Roads
Dirt Roads

Lame Deer
Indian Reservation

Area Attempting to
Withdraw from School
District

School District

Rosebud & Ashland Areas

